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IN THE

# Supreme Court of the United States.

OCTOBER TERM, ~~1952.~~ 1953

No. ~~608~~ 23

WALTER J. KOWALSKI,

*Petitioner,*

vs.

ALBERT B. CHANDLER, Individually and as Commissioner of Baseball, *et al.*,

*Respondents.*

## REPLY BRIEF OF PETITIONER.

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IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1952.

No. 668.

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WALTER J. KOWALSKI,

Petitioner,

vs.

ALBERT B. CHANDLER, Individually and as Commissioner of Baseball, *et al.*,

Respondents.

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## REPLY BRIEF OF PETITIONER.

The petitioner in his application for a writ of certiorari has presented the sole and precise issue raised by the Court of Appeals for the Sixth Circuit. If this Court will take the opinion of that Court and place it side by side with *Gardella* v. *Chandler,* 2 Cir., 172 F. 2d 402, it will become manifest that the dissent of Judge Chase therein on the issue of trade and commerce was the only basis for the decision below.

The Court of Appeals, therefore, in agreement with the view of Judge Chase, held that there was a lack of jurisdiction over the subject-matter of the action under the authority of *Federal Baseball Club* v. *National League,* 259 U. S. 200, affg. *National League, etc.* v. *Federal Baseball Club,* 269 F. 681. We are satisfied that if this Court reviews that question, it will necessarily have before it the issue: "Does the

complaint state a cause of action?" It will also have before it in their respective applications to the complaint each and every statute relied upon therein. We specifically pray that this Court deem the petition made herein to cover the question as to the sufficiency of the complaint and all of the reasonable inferences to be drawn therefrom in plaintiff's favor.

The respondents are endeavoring to isolate each segment, member and representative of Organized Baseball, and thus to avoid or insulate the liability which is inevitably joint and several as the result of their monopoly in violation of the Sherman Law (*American Tobacco Co.* v. *United States,* 328 U. S. 781, 809).

The crux of respondents' position is that *Federal Baseball Club* v. *National League, supra,* is *stare decisis;* first, because wire service is the same as radio and television; secondly, that ball playing is sport, not trade; thirdly, that the administration of the reserve clause does not differ essentially from the proof as to its operation up to 1922; fourthly, that plaintiff comes within the specific exemptions of the Clayton Act (38 Stat. 738 [1914], 29 U. S. C. §52 [1946]) and the provisions of the Norris-LaGuardia Act (47 Stat. 70 [1932], 29 U. S. C. §101 [1946]); fifthly, that plaintiff did not play for a club whose games were the subject of broadcasting and telecasting; sixthly, that plaintiff is not a person who can sue for treble damages.

If answers to these questions are essential for relief, these answers are:

First, wire service does not furnish any analogy to the direct presentation of games through broadcasting

and telecasting to members of the public in their own homes or at places of entertainment within states other than that in which the game is being played. The auditor or watcher does not have to wait for the translation or transcription of the signal or message, a circumstance that was especially true of the telegraph in the days prior to the abandonment of the Morse Code. Further, broadcasting and telecasting impose the duty upon the clubs and Leagues of transporting across state lines in preparation for each game or series personnel and equipment, including at least umpires and baseballs when the few intrastate clubs meet, in order to perform the contracts with the sponsors. These preliminaries are clearly elements of interstate commerce (*Lorain Journal* v. *United States,* 342 U. S. 143).

Secondly, professional ball playing is no longer sport within the meaning of the Sherman Anti-Trust Law (26 Stat. 209; 15 U. S. C. A. §§1, 2, 3). The personal effort of the players is now related to production, in plain distinction from their role in the *Federal Baseball Club* case, *supra,* 209, through their connection with the advertisement of the goods sold nationally by the sponsors of radio and television. Proximate causation exists at common law between the action of the club and the advertisement of the sponsors over radio and television as the former must cooperate fully to make effective the interstate transmission of the sights and sound of the game for the purpose of holding the attention of the public through the intervals allotted to the commercial announcements (*Graves* v. *Johnson,* 179 Mass. 53, 156 Mass. 211). Nevertheless, this technical nexus is not mandatory for the enforcement against the Leagues and

club owners of the policy of the United States (*Sage* v. *Hampe*, 235 U. S. 99, 106), for their monopolization of this unique and modern means of advertising (*Stevens Co.* v. *Foster & Kleiser Co.*, 311 U. S. 255).

Thirdly, the Major League clubs maintain this monopoly over the sale of the rights to broadcast and telecast their games:

(a) by maintaining their separate monopoly over the players by reason of the reserve clause;

(b) by unilaterally manipulating this clause, so that the players are, in effect, chattels (Note, "Baseball Players And The Anti-Trust Laws", 53 Columbia Law Review, 242, 247);

(c) by use of the blacklist in case of the violation of the will of the clubs and of Organized Baseball.

Fourthly, the Norris-LaGuardia Act (47 Stat. 70 [1932], 29 U. S. C. §101 [1946]) and Sections 6 and 20 of the Clayton Act (15 U. S. C. A. §17; 38 Stat. 738 [1914], 29 U. S. C. §52 [1946]) did not countenance these restraints on the employment of unorganized individuals (*Anderson* v. *Shipowners' Association*, 272 U. S. 359; Note on *Gardella* v. *Chandler*, *supra*, 62 Harvard Law Review, 1240, 1242). Organized Baseball was not given immunity by these statutory provisions which were enacted to protect labor union activities (*United States* v. *Hutcheson*, 312 U. S. 219, 236; Peter S. Craig, Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws, 62 Yale Law Journal, 576, 613-621).

Fifthly, the respondents cannot isolate their activities. The accusation leveled at them is that Organ-

ized Baseball, including each and every defendant, directly manipulates, participates and engages in the over all conspiracy described in the complaint as Organized Baseball. (See *Associated Press* v. *United States,* 326 U. S. 1, 19; Monopsony in Manpower, *supra,* 607). Further, one and all enjoy the fruits and benefits thereof. It is consequently immaterial which ones at any given time engage in all the activities alleged. Furthermore, it is sufficient to point out that they had allocated among themselves and have retained the exclusive territorial rights for the clubs (*Ibid.,* 599, 603). The more recent acquisition of broadcasting and telecasting rights by the members of this monopoly, and its power to pick and choose who shall engage in broadcasting and telecasting and who shall not, furnish no defense or exemption under the Sherman Law. Instead, the exercise of these rights has brought to the fore the possession by Organized Baseball of "a virtual monopsony on the player supply" (*Ibid.,* 605). Before the congressional power of investigation was exerted to demonstrate the character that Organized Baseball had assumed, a discerning commentator realized that *Gardella* v. *Chandler, supra,* implied judicial awareness of this transformation of the professional game into a powerful monopoly (Organized Baseball Is Held To Be Commerce Within the Meaning of Anti-Trust Acts, 1 Syracuse Law Review, 148).

Sixthly, the right of the plaintiff to bring a treble damage action is as broad as the application of the Sherman Law (*Mandeville Farms* v. *Sugar Co.,* 334 U. S. 219, 234).

The ostensible concessions of respondents with reference to the power of Congress over Organized

Baseball does not qualify in the slightest degree the authority of *Federal Baseball Club* v. *National League, supra.* If the gloss read into this decision by the Court of Appeals for the Sixth Circuit is correct, the opinion delivered by Mr. Justice Holmes for this Court stands permanently as the constitutional prohibition against resort by Congress to the interstate commerce clause to regulate by an anti-monopoly statute the intrusion for profit by professional baseball and every other sport into the lucrative business of national advertising through the broadcasting and telecasting of local games and exhibitions. The immediate purpose of these concessions is to prevent the trial by the United States District Courts of pending treble damage actions. These actions afford the solitary avenue currently available for adjudications upon the reasonableness of the reserve clause and of the related provisions in the servitude contracts of Organized Baseball.

*New Orleans* v. *Emsheimer,* 181 U. S. 153, invoked by respondents, is inapposite. The appellant had prevailed in an interlocutory proceeding below upon a ground other than the jurisdictional point upon which review was vainly sought.

Dated, May 5, 1953.

Respectfully submitted,

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